FEDERAL MEDIATION AND CONCILIATION SERVICE

BEFORE SANDRA SMITH GANGLE, ARBITRATOR

In the Matter of the Arbitration between	)	
POE ASPHALT PAVING, INC.,	)	**FMCS Case No. 010123-05085-7**
Employer,	)	**DECISION AND AWARD**
and	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370,	)	**Small Works LOU: Zone Pay Grievance**
Union	)	

Hearing Conducted:	June 7, 2001
Representing the Union:	Steven Crumb, Attorney at Law Crumb & Munding, P.S. 1950 Bank of America Financial Center 601 W. Riverside Spokane, WA 99201-0611
Also Present:	Curt Koegen, Bus. Mgr., IUOE, Local 370
Representing the Employer:	Rube G. Junes, Attorney at Law Law Offices of Clark and Feeney P.O. Drawer 285 Lewiston, ID 83501
Arbitrator:	Sandra Smith Gangle, J.D. Sandra Smith Gangle, P.C. P.O. Box 904 Salem, OR 97308-0904
Date of Decision:	August 31, 2001

BACKGROUND

This matter came before the arbitrator pursuant to a collective bargaining agreement (CBA) between ***Inland Northwest AGC (a chapter of the Associated General Contractors of America, Inc.),*** and ***International Union of Operating Engineers, Local #370***, effective between June 1, 2000 and May 31, 2003. Ex. E-1; Ex. U-1.[1] Associated General Contractors is a multi-employer bargaining agent, acting for and on behalf of a group of construction-contractor employers (approximately 100) who have requested the AGC to act as their bargaining agent. ***Poe Asphalt Paving, Inc.,*** referenced herein as "the Employer" or "Poe", is one of the employers represented by AGC in the referenced CBA.

This matter arose as a result of a grievance filed by the Union, on behalf of its members. The parties, having been unable to resolve the matter during the initial steps of the contractual grievance procedure, mutually selected Sandra Smith Gangle, J.D., of Salem, Oregon, through selection procedures of the Federal Mediation & Conciliation Service, as the labor arbitrator who would conduct a hearing and render a final and binding decision in the matter.

A hearing was conducted on June 7, 2001 in a conference room of the law firm of Crumb & Munding, Spokane, Washington. The parties were thoroughly and competently represented by their respective attorneys throughout the hearing. The Union was represented by Steven A. Crumb, of the Crumb & Munding law firm. The Employer was represented by Rube G. Junes, of the Law Offices of Clark and Feeney, Lewiston, Idaho.

The parties stipulated that the matter was properly before the arbitrator and that there were no objections to procedural or substantive arbitrability. The parties were each afforded a

[1] Employer exhibits are referenced herein as E-1, etc.; Union exhibits are referenced as U-1, etc.

full and fair opportunity to present testimony and documentary evidence in support of their respective positions. The arbitrator tape-recorded the hearing, as an adjunct to her personal notes. The parties agreed that the arbitrator's tape was her personal property and would not be an official record of the hearing, nor would her tapes be available to any party following the hearing.

The following witnesses appeared and testified under oath and were subject to cross-examination:

(a) For the Union: Jerry Stephenson, Donald J. Hawkins, Larry Cameron, Mark Poe (Adverse Witness) and Curt Koegen;

(b) For the Employer: Curt Koegen (Adverse Witness) and Mark Poe.

Since this is a contract interpretation case, the Union bears the burden of proof. Therefore, the Union proceeded with its case-in-chief first. At the conclusion of the Union's evidence, the Employer moved for a summary dismissal of the grievance. The arbitrator denied the motion. The Employer then presented its case and the Union had the opportunity to rebut the Employer's evidence.

At the close of the hearing, the parties elected to present written briefs in lieu of oral closing argument. They agreed that July 6, 2001 would be the postmark date for the Union's opening brief and August 6, 2001 the date for the Employer's response. The Union would have the option of submitting a rebuttal brief by August 20, 2001. Upon receipt of the final brief by fax transmission on August 20, 2001, the arbitrator officially closed the hearing.

The arbitrator has considered and weighed all the testimony and evidence offered by the parties. She has carefully considered the final arguments of the parties in reaching her decision.

STATEMENT OF THE ISSUE

The parties did not agree upon a statement of the issue before the arbitrator. They each offered a separate statement and stipulated that the arbitrator had authority to frame the issue, based on the evidence presented at the hearing and the argument of the parties.

The Union framed the issue as follows:

Is Poe Asphalt Paving, Inc. required to pay 100% of the wage scale outside of the geographic zones for small works, private jobs? If so, what is the appropriate remedy?

The Employer framed the issue as follows:

What is the definition of the geographic zones for which Poe Asphalt Paving, Inc. must pay in accordance with the collective bargaining agreement?

The arbitrator, having reviewed the record and the parties' briefs, hereby frames the issue as follows:

Did Poe Asphalt Paving, Inc. violate the collective bargaining agreement of the parties when it declined to pay 100% of the wage scale for certain small works, private jobs after June 1, 2000? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 1 – PURPOSE OF AGREEMENT

1.1. The purpose of this Agreement is to promote the settlement of labor disagreements by conference, to prevent strikes and lockouts, to stabilize wages and working conditions in BUILDING, HEAVY & HIGHWAY CONSTRUCTION work in the area affected.

1.2 * * * * * It is agreed and understood between the parties hereto that this Agreement contains all the covenants, stipulations and provisions agreed upon by the parties hereto.

* * * * *

1.4 The Union recognizes the Associated General Contractors as the exclusive bargaining agent for each Employer who has authorized the Associated General Contractors to negotiate

with the Union on its behalf.

ARTICLE 2 – WORK AFFECTED

2.1 The persons, firms, associations, corporations, joint ventures, or other business entities party to or bound by the terms of this Agreement as "Employer" or "Employers".

ARTICLE 4 – TERRITORY COVERED

4.1 This Agreement shall cover all INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL #370 work in the following counties East of the 120th Meridian: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Lincoln, Okanagan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman and Yakima in the State of Washington; and Benewah, Bonner, Boundary, Clearwater, Kootenai, Latah, Lewis, Nez Perce, Shoshone, and that part of Idaho County North of Parallel 46 in the State of Idaho.

ARTICLE 15 – SETTLEMENT OF DISPUTES & GRIEVANCES

15.2 Failure of an Employer to make wage, travel and/or zone pay differential, penalty pay, or other negotiated fringe payments as outlined in this Agreement, is a violation of this Agreement and not subject to Grievance Procedure as outlined below. In the event of violation and alter (sic) forty-eight (48) hour notice to the Inland Northwest Associated General Contractors, the Union shall have the right to take economic action against such Employer to collect such monies owed.
15.7 *** * * * *** The decision of the arbitrator shall be within the scope and limited to the interpretation of this Agreement upon the points of issue as stipulated and shall be final and binding upon the parties. The arbitrator shall promptly render a decision, but not later than 30 days. Expense of employing said impartial arbitrator shall be paid equally by both parties.

ARTICLE 24 – CRAFT SCHEDULES

24.1 The classifications for employees, wage rates, effective dates, health and security, pensions, training and other benefits funds, and other considerations of employment, shall be as provided in the separate schedules attached hereto and made a part of this agreement.

ARTICLE 25 – SPECIAL CONDITIONS

25.1 Both parties recognize that there may be extenuating circumstances when it is to the mutual interest of both parties to modify the terms of this Agreement. In that event, it will not be a violation of this Agreement for the parties to meet and mutually agree to make such modifications to meet a specific need on a specific project.

ARTICLE 26 – EFFECTIVE DATE AND DURATION

26.4 All employees covered by this Agreement shall be classified and paid in accordance with the classifications and wage rates as set forth in the craft schedules attached hereto, and hereby made a part of this Agreement, and no other classifications or wage rates shall be recognized unless this Agreement shall be modified as provided fir in the Craft Schedules of this Agreement.

SCHEDULE A
OPERATING ENGINEERS LOCAL #370
WAGE RATES
HEAVY – HIGHWAY

A separate Schedule A covering rates of pay for building construction shall be attached to this agreement.

Zone rates will apply to all work outside a 45 mile radius from the main post office of Spokane, Pasco, Moses Lake and Lewiston.

ZONE CENTERS: **Spokane, Moses Lake, Pasco, Lewiston**
ZONE 1 = **0-45 MILES**
ZONE 2 = **45 MILES & OVER**

HVY-HWY OE – GROUP "O":

	6-1-99	6-1-00	6-1-01	6-1-02
		Wage $.25	$.50	$.50
ZONE 1:	**$20.44**	**$20.69**		
ZONE 2:	**$22.44**	**$22.69**		

* * * * *

SCHEDULE A-III
BUILDING CONSTRUCTION – WAGE RATES

	6-1-99 Zone 1	6-1-99 Zone 2	6-1-00 Zone 1	6-1-00 Zone 2	6-1-01 Zone 1	6-1-01 Zone 2	6-1-02 Zone 1	6-1-02 Zone 2
					$ .50*		$ .50*	
Group "0"	$19.94	$21.94	$20.19	$22.19				

* * * * *

Ex. U-1, Ex. E-1

LETTER OF UNDERSTANDING[2]
COVERING
COMMERCIAL, INDUSTRIAL & RESIDENTIAL CONSTRUCTION . . .
JUNE 1, 2000 TO MAY 31, 2003

SECTION !. This understanding … shall apply to all . . . projects . . . ..

SECTION 2. The understanding shall cover the jurisdictional area described as in Article 4, Territory, of the Master Labor Agreement.

* * * * *

[2] This document, which will be identified throughout this Award as the "Small Works LOU", was separately signed, on the same date, and by the same representatives of the Union and the AGC Negotiating Teams, as the main body of the 2000-2003 CBA and Craft Schedules. In the Union's Exhibit book, it was a separate document from the main body of the CBA. Ex. U-7. In the Employer's Exhibit book, it was combined with the CBA documents. Ex.E-1.

SECTION 4. The individual portions of the work allowed to be bid separately is (sic) as follows:

1) Paving …….$500,000
2) Crushing <see note> …….. $500,000
3) Grading & Clearing ……$500,000
4) Bridges & Related Work ……$500,000
5) Utilities …….. Unlimited
6) Buildings …….. $2,000,000

NOTE RE: CRUSHING

On crushing operations for public works projects when prevailing rates are applicable, it is understood that the Master Labor Agreement and the prevailed rates are applicable to the production process once it is started through to completion of the crushing. All work related to moving in, setting up and moving out is intended to come under the provisions of this understanding. On non-prevailed work, crushing projects: Zone 1 rates will apply.

The parties agree to be bound by, to adopt and incorporate by reference as a part of this understanding all of the terms and conditions (including all monetary contribution requirements) of the labor agreement.

* * * * *

COMPLIANCE AGREEMENT

An Employer to be eligible to utilize the terms of this understanding must be party to the master labor agreement.

WORK CLASSIFICATIONS

SECTION 1. The classification of employment shall be as set forth in the wage schedules of the master agreement and shall be computed at eighty-five percent (85%) for Building Construction and ninety percent (90%) for Heavy-Highway Construction of the classification. * * * * *

EFFECTIVE DATE & DURATION

It is mutually agreed and understood by the parties signatory hereto, that this understanding shall be in full force and effect as of June 1, 2000, termination shall coincide with the master labor agreement.

SPECIAL CONDITIONS

In order to preserve work for the union members and make the Employer more competitive on all projects, the Union and the Employer may mutually agree to put this understanding into effect on projects higher than the coverage allowed in Section 4. In addition, both parties may mutually put in to effect special wages and conditions for specific areas or projects for a specific period of time.

Exhibit E-1, Exhibit U-7 (Emphasis in original)

STATEMENT OF THE FACTS

The undisputed facts of this matter are as follows:

There has been a long history of CBA's negotiated between a group of approximately 100 Eastern Washington and Northern Idaho-based construction-contractor employers, represented by Inland Northwest Associated General Contractors (AGC), and a coalition of craft bargaining units represented by Operating Engineers Local 370 (the Union herein), Cement Masons, Laborers and Teamsters Unions. Poe Asphalt Paving, Inc. (Poe) has been one of the employers who participated in all of the agreements, going back at least to 1991.

The crafts customarily have collaborated when negotiating many of the terms and conditions of their respective CBA's. They refer to those provisions that are common to all the crafts as "boilerplate language". The crafts ordinarily negotiate separately with the AGC, however, over their respective wage schedules (Schedule A), trust funds (Schedule B) and hiring hall rules (Schedule C). Once the contracts are fully negotiated, each craft signs a separate contract with the AGC, combining the "boilerplate language" with the craft's unique supplemental documents. See. e.g., Ex. E-1, U-1.

Beginning in approximately 1983, the Operating Engineers and the AGC negotiated, in conjunction with each successive labor agreement, a document that referenced special conditions to be applied to certain non-prevailed private works contracts, the value of which was below a certain agreed maximum. The parties agree that the purpose of these documents, which came to be known as Small Works Letters of Understanding, has always been to allow the AGC employers some flexibility in their contractual obligations, so that they could capture certain

small works contracts that they would otherwise lose to non-union contractors as a result of price competition.

Only two of such documents remain in existence for the period prior to 1991. The first, dated February 15, 1983, covered paving contracts below $75,000, crushing below $200,000, grading & clearing below $350,000, bridges and related work below $500,000 and buildings below $2,000,000 in value. The document expressly provided, in Article I – Coverage, that the jurisdictional area of the document would be:

> "as in Article III, Territory, of the Master Labor Agreement, subject to [an] exclusion [to the area] within the 45-mile radius of the Spokane and Lewiston centers for the paving portion only. . . ."
>
> Ex. U-2, E-2.[3]

The second was dated June 1, 1989. That document provided for payment of wages to bargaining unit members at 80% of the contractual wage rates for "private and non-prevailed public works" that were below $2,000,000 in bid value for all categories of work. The document had no exceptions to the jurisdictional area that would be included, providing instead as follows:

> SECTION 2. The understanding shall cover the jurisdictional area described as in Article 4, Territory, of the Master Labor Agreement.
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> Ex. U-3, E-3.[4]

During negotiations for the parties' 1991-94 master labor agreement, a document identified as "Addendum #1" was produced, under date of May 29, 1991. See Ex. U-8, E-5. That document, which contained no signatures, referenced as *"Item II: Small Works Letter of Understanding"*, the following language:

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[3] Only two pages of that document remain in existence. The contents are referenced as Articles I, II, IX and X. Articles III through VIII appear to be missing. Also, there are no signatures on the copy. The parties do not dispute, however, that the document was part of their contractual relationship between Feb. 15, 1983 and May 31, 1984.

[4] This document, which is three pages long, appears to be complete. The copy that was offered in evidence at the hearing showed that the original had been signed by representatives of the union and AGC on June 1, 1989. The

On non-prevailed work where the contractor's portion is $250,000 or less, the following rates shall apply:

6/1/91	Laborers:	$12.75
	Operating Engineers:	$14.65
	Teamsters:	$14.65

Plus wage increases on 6/1/91, 6/1/92, 6/1/93

15-mile radius around: *Ellensburg, Yakima, Wenatchee, Omak, Kennewick, Richland, Pasco, Lewiston, Walla Walla, Pullman, Moscow, Moses Lake.*

Spokane: *a defined area as per map.*

See Ex. U-8 and E-5, page 1 (emphasis added).

Attached to the Union's copy of "Addendum #1"[5] were copies of two maps. The first map depicted the greater Spokane area. A yellow highlighted line was drawn in a generally rectangular pattern, through Deer Park and Green Bluff on the north side of the city, the Idaho border to the east and Valleyford and Freeman to the south. On the west side of Spokane the line contained a jog in the area surrounding Nine Mile Falls. The second map depicted the southeastern corner of the state of Washington. A number of circles of roughly equal size had been drawn around the following cities on that map: Wenatchee, Ellensburg, Yakima, Moses Lake, Walla Walla and the Tri-Cities (Richland, Pasco and Kennewick). A slightly larger circle was drawn around the area that included Pullman, Colfax, and Clarkston in Washington and Moscow and Lewiston in Idaho. On the bottom of the second map were the following hand-printed words, "90% wage areas". See Ex. U-8 only.

On June 1, 1991, a Letter of Understanding (LOU) was negotiated[6] by representatives of

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document expressly referenced that it was "Prepared By: Inland Empire Chapter, [AGC], Spokane, Washington".

[5] The copy of Addendum #1 that was submitted in evidence by the Union at the hearing was five pages long and contained matching staple marks in the upper left corner of each of the pages. Ex. U-8. The copy of Addendum #1 that was offered by the Employer was only three pages long and did not include the maps. Ex. E-5.

[6] No executed copy of the June 1, 1991 LOU exists. Both parties offered in evidence a copy containing blank signature lines only. The parties do not dispute, however, that the document was executed became a part of the 1991-94 CBA between the Union and the AGC.

the Union and AGC bargaining teams. By its terms, the LOU covered grading, drainage, bridge, concrete operations, crushing and paving contracts up to $250,000 in value and buildings up to $2,000,000 in value. See Ex. U-4, E-4. The document contained the following provisions, in pertinent part:

> SECTION 2. The understanding shall cover the jurisdictional area described as in Article 4, Territory, of the Master Labor Agreement.
>
> * * * * *
>
> WORK CLASSIFICATIONS
>
> SECTION 1. The classification of employment shall be as set forth in the wage schedules of the master agreement and shall be computed at eighty-five percent (85%) for Building Construction and ninety percent (90%) for Heavy-Highway Construction of the classification.
>
> * * * * *
>
> EFFECTIVE DATE AND DURATION
>
> It is mutually agreed and understood by the parties signatory hereto, that this understanding shall be in full force and effect as of June 1, 1991, termination shall coincide with the master labor agreement.
>
> SPECIAL CONDITIONS
>
> In order to preserve work for the union members and make the Employer more competitive on all projects, the Union and the Employer may mutually agree to put this understanding into effect on projects higher than the coverage allowed in Section 4. In addition, the parties may mutually put in effect special wages and conditions for specific areas or projects for a specific period of time.
>
> Ex. U-4, E-4.

The parties agree that they routinely negotiated, agreed upon and signed similar LOU's when they negotiated each successive CBA *after* 1991 -- in 1994 and 1997 respectively. See Ex. U-5, U-6, E-6 and E-7. There were some variations in the provisions of each of the successor LOU's, including changes in the dollar values of the "small works" and the addition of a highlighted box containing a "note" regarding crushing projects. With the exception of the effective dates, however, each of the successor LOU's contained identical language to the

language that is quoted above, from the 1991 version of the LOU.

Between June 1, 1991 and May 31, 2000, all of the subject employers, including Poe, paid wages at reduced rates, as referenced in the most recently negotiated Small Works LOU, for non-prevailed projects that were within the dollar-value limits set forth in the document. The reduced wage rates were only paid, however, for projects that were situated within the boundaries of the geographical areas marked on the maps attached to the Union's version of the document known as "Addendum #1", except in limited circumstances when the parties mutually agreed to modify the rates for specified projects.

In the Small Works LOU that the parties negotiated in conjunction with their 2000-2003 agreement, the dollar values for all "small works" contracts except buildings changed from $250,000 to $500,000. The value stated for buildings remained at $2,000,000. Other than that change and the new effective date, there were no other changes in the 2000 document from the text of the 1997 LOU. There was no discussion during bargaining for the 2000-2003 CBA regarding specific geographic regions where the reduced wage rates would be payable under the small Works LOU.

On June 1, 2000, Poe notified the Union that it would henceforth pay the reduced wage rates that are referenced in the 2000-2003 Small Works LOU for all small works that might be bid anywhere within the jurisdictional area that is referenced in Article 4 of the CBA. No other employer or the AGC has made a similar announcement. The Union grieved Poe's notice and it is that grievance that is before the arbitrator for resolution in this matter.

POSITIONS OF THE PARTIES

A. ***The Union***: The Union contends that the parties agreed during bargaining in 1991 upon certain changes in the Small Works LOU from the terms that had been included in the previous (1989) version. First of all, the dollar value of the contracts eligible for "small works" treatment was changed from $2,000,000 to $250,000. Also, the wage rate reductions were changed from 80% of scale to 90% (for building construction jobs) and 85% (for heavy and highway construction). Finally, the parties agreed upon limited geographic "zones", within which the Employer would pay the reduced contractual wage rates. The "zones" where the reduced wages would be payable were established as circular areas within a 15-mile radius of the centers of certain larger cities in Eastern Washington and Northern Idaho, and a slightly larger "zone" surrounding the city of Spokane, which was shaped in a more-or-less rectangular pattern.

The applicable "zones" were delineated and highlighted on two maps that were attached to a document entitled "Addendum #1", on May 29, 1991. Language describing the geographical "zones" shown on the maps was included in "Addendum #1", as follows:

> 15-mile radius around: Ellensburg, Yakima, Wenatchee, Omak, Kennewick, Richland, Pasco, Lewiston, 8 Walla Walla, Pullman, Moscow, Moses Lake.
> Spokane: a defined area as per map.
>
> See Ex. U-8.

That language was supposed to be incorporated into the text of the "Small Works LOU" that accompanied the parties' 1991-94 CBA, according to the Union. For some unknown reason, however, neither the textual material nor the maps were physically incorporated into the final CBA documents anywhere. The Union contends it had been the responsibility of the AGC to produce the final document and somehow the provision regarding the geographical "zones" was

missed. Nevertheless, the "zones" and the maps that illustrated them, were included in the terms of the parties' collective bargaining agreement, in the Union's view.

The employers who were involved in negotiating on the AGC's team at that time were willing to agree to the "zones", says the Union, because at that time there were no small works contracts available outside the boundaries of those "zones" anyway. The "zones" were an important feature from the Union's perspective, however, because they made the wage reduction provision more acceptable to their members during the ratification process.

The Union alleges that the "zones" were never negotiated out of the parties' labor agreement. Therefore, they were incorporated into the parties' CBA's 1994 and 1997, by implication. The parties always understood, when they negotiated the wage reduction provision of the Small Works LOU's, that the wage reductions would only be permitted within the boundaries of the "zones" that had been agreed upon in 1991.

All 100 employers who were subject to the AGC contracts, including Poe, honored the "zone" limits for small works between June 1,1991 and May 31, 2000, alleges the Union. Neither the AGC nor any of the 100 employers, including Poe, expressed any intent to stop honoring the "zones" during bargaining for the 2000-2003 CBA. Therefore, the "zones" were bargained into the current contract just as they had been in the previous contracts.

The Union points out that every employer except Poe continues to honor the "zones" under the 2000-2003 Small Works LOU. Poe violated the CBA, when it unilaterally took the position in June of 2000 that it would no longer honor the 15-mile-radius "zones".

The Union acknowledges that there is no written language anywhere in the 2000-2003 CBA referencing the "zones". For that reason, the contract is not a fully integrated document, in

the Union's view. The Union relies on the principle of *past practice*, to prove that there is a term of the parties' contract that is not expressly contained within the four corners of the document, namely the geographical description of the "zones" where reduced wages may be paid for small works projects. The Union asks the arbitrator to find that Poe violated the parties' CBA when that sole employer refused to continue honoring the "zones".

B. ***The Employer:*** Poe asserts that the parties' CBA is an integrated document and that it should be interpreted according to its written terms exclusively. Article 1.2 expressly provides that the document "contains all the covenants, stipulations and provisions agreed upon by the parties" during bargaining. Also, Article 26.4 provides that "no other . . . wage rates shall be recognized" unless the "Agreement [is] modified as provided for in the craft schedules."

Poe acknowledges that a Small Works LOU was signed contemporaneously with the 2000-2003 CBA. According to that document, which was similar to LOU's that accompanied past CBA's, the parties expressly agreed to reduce the contractual wage rates on certain non-prevailed small works projects. The LOU referenced the CBA's jurisdictional area as being set forth in Article 4. Therefore the entire area described in Article 4 is the geographical boundary within which the reduced wage provision would apply. As a result, Poe did not violate the contract or the LOU when it took the position, in June of 2000, that it would henceforth pay the reduced wage rates on all small works projects and would not honor the geographical limitations it had recognized in the past.

Poe does not dispute that the maps, on which the Union now relies, had been utilized by its payroll staff in determining wages payable under small works contracts as far back as 1991. Poe contends the maps were never incorporated into any CBA between the parties, however.

Therefore, they are not enforceable contractually. According to Poe's final brief to the arbitrator, the May 29, 1991 "Addendum #1" and its attached maps were merely "a talking points summary of identified issues for further discussion". If the arbitrator were to find that the 15-mile-radius "zones" marked on those maps had been incorporated into the parties' CBA, she would be *adding* a discrete term to the written contract, says Poe, and such an addition is prohibited.

The Employer disagrees with the Union that the theory of *past practice* applies in this case. First, the matter of wages is fully and clearly addressed in the parties' CBA, Schedule A (Wages), and the Small Works LOU. Therefore, there is no need to supply a missing contract term. Secondly, no past practice can be used to modify clear contract language. Since the contract is clear and unambiguous, custom and practice cannot be relied upon to resolve any ambiguity. Finally, the LOU itself shows that the contract language has been amended by mutual agreement. Therefore, no past practice is needed to demonstrate any modification.

For those reasons, the Employer asserts that the grievance should be denied.

DISCUSSION

The arbitrator's role is to determine whether the parties' collective bargaining agreement has been violated. This case involves contract interpretation. Therefore, the Union, rather than the Employer, bears the burden of proof and the burden of persuasion.

The Union concedes that the "zones" on which it relies are not described anywhere in the written contract or its attachments. See Ex. U-1, U-7, E-1. The Union does not contend that the contract is ambiguous because of the missing term. The Union's position is that the contract is

not an integrated document and it relies on the principle of *past practice* to supply the missing term. Specifically, the Union contends that the Small Works LOU should be interpreted to include the express language that showed the geographical coverage area, as agreed upon in Addendum #1 in 1991, just as all prior LOU's had been interpreted be the parties under their three predecessor agreements (1991-94, 1994-97 and 1997-2000).

The Union contends that the AGC and all 100-or-so of the contractors it represents have understood and honored the geographic "zones" as marked on two maps and as described by the following language in "Addendum #1" ever since May 29, 1991:

> 15-mile radius around**:** Ellensburg, Yakima, Wenatchee, Omak, Kennewick, Richland, Pasco, Lewiston, Walla Walla, Pullman, Moscow, Moses Lake.
> Spokane: a defined area as per map.
>
> Ex. U-8

For some unknown reason, the language was not included in any of the parties' CBA's. The provision was nevertheless negotiated into the CBA as an *implied term* in 1991 and it has never been negotiated out. Therefore, the "zones" remain enforceable in the current CBA.

The Employer argues that the *parol evidence rule* prohibits, as a matter of law, any consideration of matters outside the parties' written agreement. Even if the *parol evidence rule* is deemed inapplicable here, however, the arbitrator should find that the 2000-2003 CBA and its simultaneously executed Wage Schedule and Small Works LOU, are clear and unambiguous and need no interpretation, says the Employer. The matter of the dispute, namely the payment of reduced wages for small works contracts, is explicitly covered within the written documents and should be enforced accordingly. The arbitrator should not resort to extrinsic evidence of any *past practice,* either to add a term to the CBA or to modify the agreement.

A. Legal and Arbitral Authority:

The parties agree in their briefs that a Washington Supreme Court case, ***Berg v. Hudesman***, 115 Wn.2d 657, 801 P.2d 222 (1990) is applicable legal authority on the application of the *parol evidence rule* in contract interpretation cases in Washington State courts.[7] Also, the parties agree that the arbitration treatise by Elkouri and Elkouri, entitled ***How Arbitration Works,*** (BNA, 5th Ed. 1997)[8], is reliable authority for analyzing contract interpretation issues in labor arbitration cases. Therefore the arbitrator will begin her analysis by referring to those authorities.

In ***Berg v. Hudesman***, 115 Wn.2d at 667, the Washington Court recognized that the "cardinal rule" of contract interpretation, as framed by Corbin in his treatise on ***Contracts***, is "to ascertain the intention of the parties". The Court recognized that the "Plain Meaning Rule" was embraced in past court cases involving contract language in Washington. Where contracts did not appear to be ambiguous on their face, courts routinely had enforced the *parol evidence rule* and disallowed extrinsic evidence regarding contract negotiations and other surrounding facts and circumstances from admission to the record. The ***Berg*** Court expressly rejected the "Plain Meaning Rule", however, and recognized that ambiguities are not always patently obvious. The Court adopted instead the "Context Rule", whereby extrinsic evidence is admissible to show the surrounding circumstances that led to the execution of the contract, as an aid in ascertaining the parties' intent. The Court reasoned that evidence showing the subject matter of the transaction, the situation and relation of the parties, their preliminary negotiations and statements, the usage of trade and the course of dealing between the parties could lead to a conclusion that the contract

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[7] The parties did not stipulate that that the CBA should be considered a "Washington contract". They both acknowledged ***Berg*** as applicable legal authority, however, in their briefs. The arbitrator notes that the parties' contract includes the territory of northern Idaho, as well as Eastern Washington. Neither party addressed Idaho law.

[8] The Union cited the 4th edition of the Elkouri treatise and the Employer cited the 3rd edition. The 5th edition,

language itself was not clear and unambiguous after all, but that a hidden, or latent, ambiguity was contained therein. The ***Berg*** Court also held that where a contract is not a fully integrated document, additional terms can be proven by extrinsic evidence. If proven, those additional terms are enforceable as long as they do not contradict the written contract terms.

The *parol evidence rule* has been considered, and often applied, in labor arbitration cases. See Elkouri and Elkouri, ***supra.,*** at 598-99, including case citations in fn.389. Arbitrators who apply the rule hold that the written contract consummates and supersedes all previous oral and written negotiations. If those arbitrators find an agreement to be clear and unambiguous on the face of the document, no extrinsic evidence will be allowed to vary the contract.

Many arbitrators have held, however, that absent specific language in a CBA expressly prohibiting evidence of agreements adding to, subtracting from, modifying or otherwise conflicting with the CBA itself, extrinsic evidence may be considered, in order to determine the intent of the parties. *Id*., at 598. Where, for instance, the agreement contains either a patent or latent ambiguity, evidence of pre-contract negotiations, as well as bargaining history and relevant past practices, is deemed admissible to aid in interpreting the ambiguity. Also, arbitrators routinely allow certain exceptions to the *parol evidence rule,* including separate written agreements that were negotiated contemporaneously with the CBA and collateral agreements that were not reduced to writing as well. *Id.,* at 599; See also p. 472.

At the hearing in the instant matter, the Employer asserted that the *parol evidence rule* was applicable and objected strenuously to evidence offered by the Union regarding the parties' past history of paying wages under Small Works LOU's, as well as the negotiation history of the current CBA and its predecessors, going back to 1991, and some documents that existed even

which has been updated by a 1999 Supplement, is the most recent edition. The arbitrator will rely on the 5th edition.

further in the past. The Employer contended that the current CBA, its wage schedule and Small Works LOU, are all clear and unambiguous and need no interpretation. The only "zones" that are referenced in the CBA, according to the Employer, are "zones 1 and 2" in the Craft schedules.[9] The arbitrator overruled the Employer's objections and allowed the evidence to come in, but noted the Employer's strong objection. She advised the parties that she would carefully weigh the evidence and, depending on her analysis of the *parol evidence rule* issue, would determine, first of all, whether the extrinsic evidence that the Union wished to admit was in fact admissible, either to clarify an ambiguity or under some other recognized exception. Then, if the evidence was admitted, the arbitrator would determine what weight it should receive.

B. <u>The 2000-2003 Contract: Is Extrinsic Evidence Needed for Interpretation?</u>

The parties' current CBA consists of a number of separate documents, two of which were signed on June 1, 2000 by Curt Koegen, Chairman of the Operating Engineers Local 370 Negotiating Committee, and Neal Degerstrom, Chairman of the Inland Northwest AGC Negotiating Committee.[10] Article 1.2 of the initial document provides that "[The] Agreement contains all the covenants, stipulations and provisions agreed upon by the parties." Article 4, which describes the *"Territory Covered"* by the agreement, references nineteen specific counties in Washington and nine Idaho counties, plus a portion of a tenth Idaho county. Article 26.4 incorporates by reference the *"Craft Schedules"* which are attached to the CBA and expressly provides that "no other classifications or wage rates shall be recognized unless [the] Agreement shall be modified as provided for in the Craft Schedules."

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[9] Those "zones" allow for a $2.00 per hour differential to be paid to workers when a project is more than 45 miles from the center of Spokane, Moses Lake, Pasco or Lewiston. See Schedule "A" in both Ex. U-1 and E-1.

[10] Mark Poe, President of Poe Asphalt Paving, Inc., was a member of the negotiating team for the 2000-2003 contract. AGC negotiator Degerstrom represented all the employers who are parties to the contract, including Poe,

The second document in the 2000-2003 packet is entitled "Schedule A Wage Rates Heavy-Highway".[11] A third document, entitled "Schedule III-A Building Construction – Wage Rates", follows "Schedule A". In Schedules A and III-A, separate wage rates are provided for every classification of worker in "Zone 1" and "Zone 2", and in each case the "Zone 2" rate is $2.00 higher than the "Zone 1" rate. See Footnote 10.

There is only one reference in either of the Craft Schedules to the possibility of modifying any wage rates. According to that provision, the parties are required to meet in order to negotiate a wage rate for any *new* machine that is not currently listed in the Schedule A.

Several additional documents follow the Craft Schedules.[12] The final document, which was separately signed by Curt Koegen for the Union and Neal Degerstrom for the AGC, is entitled "Letter of Understanding". It is that document that is referenced herein as the "Small Works LOU". Section 2 of the document provides that it covers *"the jurisdictional area described as in Article 4, Territory, of the Master Labor Agreement."* Section 4 references six separate categories of work that are *"allowed to be bid separately",* with the maximum dollar amounts that qualify as *"small works"* in each category. Paving, crushing, grading/clearing and bridges/related work are all capped at *$500,000 in value,* utilities are referenced as *"unlimited",* and buildings are capped at *$2,000,000 in value.*

A separate paragraph, entitled "NOTE RE: CRUSHING", contains the following provision: "On non-prevailed work, crushing projects: Zone 1 rates will apply." Then a

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during bargaining. Degerstrom did not testify at the hearing.

[11] This is what is referenced in the opening document as a "Craft Schedule".

[12] Those include: "Schedule B Trust Funds", "Schedule C Hiring Hall", "Schedule D Work Rules", and "Substance Abuse Program", with "Addendum 'A' Drugs of Abuse Data Sheet" attached. None of those documents are relevant to this grievance.

paragraph entitled "WORK CLASSIFICATIONS" provides for the reduced wage rates (85% for building construction and 90 % for heavy-highway construction) that the parties agree can be paid to employees for "small works" projects. The provision, in its entirety, is as follows:

> SECTION 1. The classification of employment shall be as set forth in the wage schedules of the master agreement and shall be computed at eighty-five percent (85%) for Building Construction and ninety percent (90%) for Heavy-Highway Construction of the classification.

Then, a final paragraph entitled "Special Conditions" allows for further modifications of wage rates, upon mutual agree in specific situations. That paragraph provides as follows:

> In order to preserve work for the union members and make the Employer more competitive on all projects, the Union and the Employer may mutually agree to put this understanding into effect on projects higher than the coverage allowed in Section 4. In addition, the parties may mutually put in effect special wages and conditions for specific areas or projects for a specific period of time.

Both the Employer and the Union have contended in their briefs of final argument that the CBA and its supplemental documents are clear and unambiguous. Yet they offer different understandings regarding the meaning and application of the documents. This tends to indicate that there is a *latent ambiguity* in the contract, which needs to be resolved through the introduction of extrinsic evidence. See generally, Elkouri, ***supra.,*** at 470-73; ***Midwest Rubber Reclaiming Co***., 69 LA 198, 199 (1977); ***Armstrong Rubber Co.,*** 17 LA 744 (Arb. Gorder, 1952); see also, Nolan, ***Labor Arbitration Law and Practice*** (1979) at 163. One arbitrator has even held that extrinsic evidence is appropriate simply to determine whether a contract that appears unambiguous is actually ambiguous. See, ***Circle Steel Corp.,*** 85 LA 738, 739 (Arb. Stix, 1984), in which the arbitrator said it is proper to consider, not only negotiation history, but also *practices*[13] of the parties, when determining whether a latent ambiguity exists in the contract language:

[13] The elements of past practice are discussed more particularly in a later section of this report.

> "[W]hether a contract is ambiguous is not to be determined simply from the face of the contract (as other arbitrators hold), but only after taking into consideration the circumstances existing at the time the contract was adopted and the practice of the parties in applying it.

Also, the parties do not agree as to whether the CBA documents are fully integrated. The Employer contends that they are integrated, but the Union contends they are not. The Union asserts that there was a collateral agreement between the parties that was never reduced to writing and incorporated within the four corners of the parties' CBA. The collateral agreement was a part of the total collective bargaining agreement of the parties from 1991 onward and was never negotiated out, in the Union's view

Even labor arbitrators who ordinarily enforce the *parol evidence rule* would likely admit extrinsic evidence to resolve such contentions. See, Elkouri, ***supra,*** at 598 and cases cited in fn. 393. A party alleging a contemporaneous oral agreement has the burden of proving it by clear and convincing evidence. See, e.g., Arbitrator Howlett in 52 LA 252, 255; Dugan in 46 LA 1018, 1020-21; Tongue in 32 LA 708, 711. However, such contemporaneous agreements are provable. Arbitrators must always remain cognizant of the U.S. Supreme Court's warning, in ***Steelworkers v. Enterprise Wheel & Car Co.,*** 80 S.Ct. 1358 (1960), that the "award is legitimate only so long as it draws its essence from the collective bargaining agreement". Therefore, they must be careful to avoid legislating or rewriting the parties' contract. However, the Court's warning does not mean that arbitrators are prohibited from obtaining clarification of what the parties *actually intended* in their CBA's, by referring to the surrounding circumstances, including, if appropriate, evidence that proves there was a collateral oral agreement to the CBA.

This arbitrator is also of the opinion that whether or not one of the parties alleges there is an ambiguity in the contract language, it may be unduly restrictive to enforce the *parol evidence*

rule. In fact, even where *both* parties have alleged that the contract language is clear and unambiguous, but their interpretations differ as to what the contract means, and both of their interpretations are equally plausible when viewed in the context of the agreement as a whole, extrinsic evidence should be relied upon to resolve the discrepancy. See, e.g., ***United Grocers,*** 92 LA 566, 569 (Arb. Gangle, 1989), cited in Elkouri, ***supra.,*** at 472, fn. 9). To do otherwise would be a disservice to the parties as the arbitrator would have to choose one party's over the other's without the benefit of helpful negotiation history.

In the instant case, the union contends that the parties understood during their negotiations for the 2000-2003 CBA that the reduced wage rates that would be allowed under the Small Works LOU would only apply within certain "zones" that were within a fifteen-mile radius of certain cities in eastern Washington and northern Idaho, as enumerated in "Addendum #1", a document that was apparently generated, but not signed, on May 29, 1991. Yet nothing in the written CBA references those particular "zones". The Employer argues that there are only two "zones" in the contract, "zones 1 and 2", which allow for travel pay whenever a worker has to commute more than 45 miles to a job site. Any supposed reference to 15-mile "zones" would conflict with "zones 1 and 2" and impermissibly modify the contract.

Under the circumstances, the arbitrator believes this is the kind of case where enforcement of the *parol evidence rule* would hinder, rather than help, the correct interpretation of the parties' contract. Therefore, the arbitrator will now consider and weigh the evidence that was offered at the hearing regarding the parties' predecessor contracts, to determine whether the parties had a meeting of the minds regarding "zones" other than "zones 1 and 2" to the extent that they were intended to be included in the 2000-2003 CBA. Clear and convincing evidence is

required.

C. The Surrounding Circumstances Leading to the 2000-2003 CBA:

Union witness Jerry Stephenson, who is now retired from his position as Business Manager of Local 370, testified that he was involved in negotiations for the parties' CBA's in 1991, 1994 and 1997, with full responsibility on behalf of the Union. He testified that he recalled negotiating the specific "zones", which are shown on the maps attached to Ex. U-8 in 1991, along with representatives of the three other unions.[14] The first map applied to all the unions and showed the fifteen-mile boundary outside of a number of cities in eastern Washington and northern Idaho within which the reduced wage rates (85% or 90%) would be payable for work done on non-prevailed "small works" projects. He said the map showing the generally rectangular-shaped Spokane "zone" was intended to apply only to the Operating Engineers.[15] The "jog" on the west side of Spokane was intended to include Shamrock Paving Co. within the 15-mile coverage area, he said. His understanding, he said, was that outside those "zones", as marked on the two maps, the employers would pay full (100%) contract wage rates for small works projects. This was a change from the 1989 LOU, which had allowed 80% wage rates to be paid for all "small works" projects, without any limitation. See Ex. E-3

Stephenson said the "zone" limitations were a "gimme" (concession) by the Employers in 1991, because they did not get any small works contracts outside of the 15-mile radii of the marked cities anyway at that time. It provided a "selling item" for the unions, however, he said, as their members would be assured that any future small contracts that might arise outside the

[14] He said that it was his recollection that the 1991 LOU was signed by representatives of the parties. The copy of that document that was offered in evidence at the hearing had no signatures.

[15] The "zones" on the second map, around Moses Lake, Pullman, Tri-Cities, Walla Walla, Yakima and Wenatchee

15-mile limitations would be payable at the full (100%) contractual wage rates. He said that everyone understood that the "zones" which marked the limits of reduced wages under Small Works LOU's were entirely different from the "zones 1 and 2" that were referenced in the craft schedules. The latter "zones" only applied to the $2.00 per hour travel pay differential that the parties agreed would be paid to employees who worked at sites more than 45 miles from Spokane and Lewiston.

Stephenson acknowledged that the maps showing the limits of the reduced payment "zones" were not included in the final draft of the Small Works LOU in 1991. Also, the language that the parties had agreed upon, which described the maps, was not included anywhere in the contract or its supplementary LOU. That language, he said, was expressly agreed upon by the parties in "Addendum #1" on May 29, 1991. He said the AGC had been responsible for printing the CBA and somehow the language and the maps, which were to be incorporated in the written documents, were "overlooked". Stephenson's testimony is supported by "Addendum #1" which expressly references "15-mile radius" limitations around the same cities in Washington and Idaho as are marked on the maps. See Ex. U-8, E-5.

Stephenson testified further that the contractor-employers were well aware of what had been negotiated and they all honored the geographical limitations that are described on "Addendum #1" and marked on the maps over the life of the 1991-94 contract, as well as throughout the two successive CBA's that were negotiated and implemented over the following nine years. He explained that, on occasion, employers came to the Union to "request permission to override the 100% requirement outside the geographic 'zones'" and that such requests prove that the Employers considered themselves to be contractually bound to the limits of wage

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only applied to the three other unions at the time, he said.[25]

reductions outside the "zones". He offered in evidence a letter he had sent to Jerry Cox, of C&B Crushing, one of the AGC-represented employers, on August 4, 1998, in which he explained that C&B Crushing was covered by the parties' Small Works LOU. In the letter Stephenson expressly referenced *"maps where 90% [payment would be] allowed when the work [was] not prevailed"* and indicated that the maps were enclosed with the letter. See Ex. U-13. He said the maps that he had enclosed were the maps that the parties had discussed during bargaining for the 1991-94 contract and were attached to "Addendum #1".

Donald J. Hawkins, who served in the past as negotiator for the Laborers Union, when the AGC contracts were bargained, supported the testimony of Jerry Stephenson. Hawkins, who is now retired, was the Laborers' Local 278 Business Manager until 1993, when he left to work for the District Council in Spokane. He served on the negotiating committee for the AGC's 1994-97 contract, he said, as well as prior contracts as far back as 1975. Hawkins testified that he recalled negotiating the Small Works LOU and its accompanying maps in 1991. He said the parties had agreed to mark the circles and put the 15-mile-radius language into the Small Works LOU attachment to the CBA, in order to define the areas where the reduced wage rates could be paid for small works contracts. To his knowledge, all the employers had honored those defined "zones", he said, until he retired from the Laborers Union in 1996.

Another Union witness, Larry Cameron, who has served as Business Agent since 1994, also testified regarding the history of the parties in implementing the LOU's during his tenure. Cameron offered in evidence a letter from Joyce Woodard, of Woodard Construction (one of the AGC-represented contractors), dated April 30, 1998, in which Woodard had expressly requested the right to pay 90% of wage scale at a project known as the "Deer Creek Estates Project". See

Ex. U-11. According to Cameron, the Deer Creek project was "outside the boundaries of the 85-90% 'zone' marked on the Spokane-area map" and the letter showed that contractor Woodard was acknowledging her inability to pay reduced wages in that particular location without a specific concession from the Union, because the location was outside the geographical limitations imposed by the Small Works LOU and the "zones" that it incorporated.

Cameron also offered his response letter to Ms. Woodard in evidence. That document, dated May 6, 1998, showed that the Union had agreed to grant the requested wage concession on the Deer Creek project, and had granted in addition a similar concession for a project in Coeur d'Alene, Idaho, which was outside the "Spokane zone", pursuant to a telephone conversation he had had with Ms. Woodard following her April 30 letter. See Ex. U-12.[16]

Finally, Cameron testified that one of the vice-presidents of Poe Asphalt Co., a man named "Jim", had asked for a wage concession once in 1996 on a small works project, known as "Cottonwood", which was located outside the geographical "zones" where reduced wages were allowed, in northern Idaho. That request had been turned down, he said. He offered in evidence some notes regarding his meeting with "Jim". See Ex. U-10.[17]

The arbitrator found Jerry Stephenson, Donald Hawkins and Larry Cameron to be credible. None of their testimony was rebutted by the Employer. No other explanation was offered by the Employer for the correspondance between the Union officers and Cox and

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[16] Cameron also offered in evidence a letter to Poe Asphalt Paving, dated June 7, 1999, expressly authorizing Poe to pay 90% of wage scale for a project in Grangeville, Idaho, known as the Idaho Mains Street Project. See Ex. U-14. According to Cameron, Grangeville, Idaho is located outside the limits of any of the 15-mile "zones" shown by the maps created in 1991. On cross-examination, however, Cameron acknowledged that Grangeville is in southern Idaho and is outside the jurisdictional area covered by the parties' CBA. Therefore, this evidence was irrelevant and has not been considered by the arbitrator.

[17] Mark Poe acknowledged in his testimony that his Vice-President in Clarkston, Idaho, is named Jim Smith.

Woodard and the evidence of wage concession requests that was contained in those letters and in the notes offered by Cameron regarding his conversation with "Jim" of Poe Asphalt Paving. The arbitrator finds that the testimony and business correspondence clearly and convincingly supports the Union's contention that, between 1991 and 1998, while the predecessor contracts to the parties' current contract were in effect, several of the signatory contractors acknowledged that the Employers' right to pay reduced wages for small works projects did not apply everywhere in the jurisdictional area covered by Article 4 of the CBA, but was subject to geographical limitations, as shown on two maps that were agreed upon and described in "Addendum #1" in 1991.

In fact, testimony given by Mark Poe himself, when called as an adverse witness in the instant arbitration, supports the testimony of the Union witnesses, regarding the parties' history of implementing the Small Works LOU's prior to June 1, 2000. Poe, who has owned Poe Asphalt Paving, Inc. since 1994, acknowledged that he had routinely honored the 15-mile-radius "zones" until June 1, 2000. He said that, from the time he began bidding construction jobs after taking over the business from his father, he "often" consulted the maps that the Union now relies on (which were kept in his payroll clerk's office, he said) and would bid the job in accordance with its location. *"Outside the marked 'zones',"* he said, *"the wage rate would be 100% [of scale]".* Poe also said his Company vice-presidents in Clarkson, Post Falls and Pullman all had honored the "zones" in the past and had authorized payment of 100% of scale outside the "zones". He said he was not sure when the maps had initially been utilized for bidding purposes. He had not been involved in the 1991 contract negotiations and he never saw a copy of the 1991 document identified as "Addendum #1" until after June 1, 2000.

Poe acknowledged that he had been a member of the AGC negotiating team during the negotiations for the 2000-2003 contract. There had been no discussion, he said, regarding either establishing or eliminating the "zones" where the 85% and 90% wage rates would be paid for small works projects. The only discussion regarding Small Works LOU's, that he could recall, had to do with the Employer's request to increase the dollar limit on small works from $250,000 to $1,000,000. The parties had eventually agreed on $500,000 as the dollar limit, he said.

It was only *after* the 2000-2003 agreement was signed, Poe said, that he read the document carefully and realized there was no express written reference to any "zones" where 85% or 90% of wage rates would be allowed. Therefore, he believed that there was no contractual obligation to continue the unwritten custom he had willingly abided by in the past. It was for that reason that he unilaterally took the position that he was not required to pay 100% of contractual wage rate outside the geographical areas marked on the old maps and notified the Union of that position.

The final witness who appeared for the Union was Curt Koegen, who has served as Business Manager for the Union since the spring of 2000. Koegen testified that he had sat in on negotiations for the parties' CBA's in 1997 and 2000. He said there was no discussion regarding changing or eliminating the "zones" where wage reductions would be allowed under small works LOU's in either of those negotiation cycles. His recollection, like Mark Poe's, was that the parties discussed the Employers' request to increase the dollar limit on small works from $250,000 to $1,000,000 during bargaining and the parties had eventually agreed on a $500,000 limit. He also recalled that the Employers had sought to decrease the wage payment for heavy highway construction / small works contracts from 90% to 80%, but the parties had ultimately

agreed to maintain that wage payment at the 90% level. Koegen also testified that he knew the employers had all abided by the geographical "zone" limitations established by "Addendum #1" and the attached maps, right up to the negotiations for the 2000-2003 CBA and that, to his knowledge, none of them except Mark Poe was objecting to the continued viability of those "zones" at the present time.

Based on this evidence, the arbitrator has determined that there was an unwritten collateral agreement of the parties that remained in effect from 1991 through the completion of negotiations for the 2000-2003 CBA. The testimony of Mark Poe also shows that he himself had acknowledged the continued enforceability of the very "15-mile zone" limitations to the reduced wage provision of the Small Works LOU's right up to June 1, 2000. He also acknowledged that neither he nor any other employer or the AGC objected to the continued viability of the collateral agreement regarding the "zones" during negotiations for 2000-2003 contract. Therefore, the arbitrator finds that the clear and convincing evidence shows there was a meeting of the minds as to the continued existence of the collateral agreement after the 2000-2003 contract was signed on June 1, 2000.

D. <u>The Labor Relations Theory of Past Practice:</u>

In addition to the theory of collateral unwritten agreement, the theory of *past practice* is relevant here and provides another way of explaining the parties' continuing obligation to honor the "zone" limitations to the reduced wage provision of the small works LOU.

According to Elkouri and Elkouri, ***<u>How Arbitration Works,</u> supra***. at 630, *custom and past practice,* under some circumstances, forms a part of the parties' "whole" agreement. Arbitrator Whitley P. McCoy explained, in ***<u>Esso Standard Oil Co.,</u>*** 16 LA 73, 74 (1951):

> [Where an employer] has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the contract was entered into upon the assumption that the customary action would continue to be taken, such customary action may be an implied term [of the parties' contract].

Arbitrator Jules J. Justin, in ***Celanese Corp. of America,*** 24 LA 168, 172 (1954) outlined the three criteria that must be met in order to support a valid *past practice*, as follows:

> In the absence of a written Agreement, "past practice" to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

According to Arbitrator Maurice H. Merrill, when a contract has been negotiated *after* a past practice has become established involving a "major condition of employment", and the parties have not repudiated or limited the practice during the negotiations for the new contract, the current of arbitral opinion favors the position that the practice is included within the new CBA, "since the negotiators work within the frame of existent practices and must be taken to be conscious of it". ***Phillips Petroleum Co.,*** 24 LA 191, 194-95 (1955).

Arbitrator Updegraff held, in ***Kroger Co.,*** 36 LA 129, 130-131 (1960) that the employer could not unilaterally repudiate an existing practice after a new agreement has been signed, in which a practice has been carried over from the predecessor contract, unless there is agreement between the union and the employer to do so. If, however, either side has *objected* to the practice *during the negotiations* for the new contract, it could be inferred that the practice is no longer a mutually accepted term of the contract, once the new contract is signed, unless the parties have negotiated and agreed to include the practice in the written contract itself. See, e.g., Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements", ***Proceedings of the 14th Annual Meeting of NAA,*** 30, 63 (BNA Books, 1961).

As to what types of activities are susceptible of becoming valid *past practices,* many arbitrators have found customs to be binding where they involved a benefit of "peculiar personal value to employees". Such benefits often involve monetary allowances of some type (e.g., cash bonuses, paid lunches, free coffee, etc.) or improved working conditions (e.g., wash-up time, work breaks, parking spaces, etc.). If the company, in giving the particular benefit to employees, has emphasized that it was a gratuity only and not part of the wage structure, the benefit may not constitute an enforceable practice, even if it has pecuniary value. Where such notice was never given, however, arbitrators may find sufficient justification to consider the benefit an established term of the parties labor agreement.

E. Are Past Practices Prohibited by a "Zipper Clause" in the Parties' 2000-2003CBA?

The Employer contends that past practices may not be incorporated in the parties' contract, because they are precluded by the following language in Article 1, Section 1.2:

> 1.2 . . . . It is agreed and understood between the parties hereto that this Agreement contains all the covenants, stipulations and provisions agreed upon by the parties hereto.

In other words, the Employer asserts that there is a "zipper clause" that prohibits the arbitrator from considering that there may be any terms and conditions that the parties agreed upon, such as through custom and past practice, beyond those that are expressly written into the CBA.

According to Elkouri, ***supra.,*** at 645-46, there are two types of zipper clauses, which the author compares as being "strong" and "weak". A "strong" clause is one that is very clear that "any matters or subjects not covered [therein] have been satisfactorily adjusted, compromised or waived by the parties". See, e.g., ***Bassick, Co.,*** 26 LA 627, 630 (Arb. Kheel, 1956). A "weak" zipper clause is one which does not contain such clear language of waiver, such as the following, from ***American Seating Co.,*** 16 LA 115, 116 (Arb. Whiting, 1951), "[T]his contract expresses

the entire agreement between the parties", or the following, from ***Fruehauf Trailer Co.,*** 29 LA 371, 374-5 (Arb. Jones, 1957), "[This contract] cancels all previous Agreements, both written and oral, and constitutes the entire Agreement between the parties." While a "strong" zipper clause would effectively "zip out" past practices, a "weak" clause would not. As explained by Arbitrator Jones, such a provision "has no magical dissolving effect upon practices or customs which are continued in fact unabated and which span successive contract periods." *Id.,* at 374-75

The "zipper clause" in Article 1.2 of the parties' CBA in the instant case is of the "weaker" type. There is no language stating that the parties have expressly waived all subjects not incorporated within its written provisions. Therefore, the arbitrator concludes that any practices or customs which have continued throughout successive contract periods and have become part of the parties' contractual relationship and have not been effectively rejected during bargaining may continue to be included within the intent and overall meaning of the agreement.

F. Was a valid past practice re: 15-mile "zones" negotiated into the Parties' 2000-3 CBA?

The arbitrator is persuaded that the parties had a valid *past practice* whereby the wage reductions that were allowed by the Small Works LOU's between 1991 and 2000 were restricted to work projects within certain "zones" that had been drawn on maps that all the parties were aware of, and consistently honored, from the time that they negotiated their 1991-94 CBA. The *"zones"* provided a benefit to workers in that they set geographical limits beyond which the wage reductions for small works would not apply and workers would be entitled to full contractual wages. They were distinguishable from "Zones 1 and 2" that were set forth in the Wage Schedules and merely referenced a $2.00 differential between wages paid for projects

within and without a 45-mile radius of certain named cities, in order to compensate employees for their travel costs when commuting more than 45 miles to work sites. The evidence is clear and convincing that the "zones" that are applicable under the Small Works LOU have a different purpose and apply to a different list of cities than "Zones 1 and 2".

The arbitrator finds that "Addendum #1", dated May 29, 1991, was a memorandum of the specific language that the parties agreed upon during bargaining for the 1991-94 LOU and that language expressly incorporated the "zones" into the LOU. The AGC was responsible for typing up the final version of that CBA and somehow neglected to include the language that is found on "Addendum #1" referencing the "zones". The parties demonstrated that they had a meeting of the minds, however, and intended to be bound by the identified geographical limitations during the terms of their 1991-94 contract and successor agreements in 1994-97 and 1997-2000, because they routinely referred to the maps showing the "zones", when they negotiated wages for small works projects over that nine-year period.

There is no evidence that any employer ever stated, when paying 100% of wage rates for small works outside the "zones", that it was merely giving a "gratuity" to workers, or that it was not contractually required to do so. The evidence shows, therefore, that the practice was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time (nine years) as a fixed and established practice accepted by both parties. It was even recognized and followed during six of those years by Mark Poe himself, who is the sole employer objecting to continuing the practice under the 2000-2003 contract.

Finally, there is no evidence that the Employer's bargaining agent, AGC, or Mark Poe, owner of Poe Asphalt Paving, Inc., or any other employer representative, raised the issue of the

"zone" limitations during bargaining for the 2000-2003 contract. In other words, all the parties on both sides of the bargaining table completed their bargaining with a similar understanding regarding the geographical limitations of the wage provision in the Small Works LOU – that is, that the reduced wages would only apply within the 15-mile radius of those cities that were identified in Addendum #1 and shown on the maps the parties agreed upon back in May of 1991. Since there were no objections to continuing the "zones" during bargaining, the practice of honoring those "zones" was bargained into the 2000-2003 CBA, just as it had been in the previous three CBA's between the parties.

The Employer has correctly pointed out that no past practice can be relied upon to *contradict* clear contract language. The Employer asserts that the geographical reach of the 2000-2003 Small Works LOU is clearly set forth in its express reference to *Article 4 Territory* of the Master CBA. The Union's theory that there is a *past practice* regarding reduced wages in a *different territory* would impermissibly contradict the express language regarding jurisdiction that is found in the CBA. The Employer incorrectly alleges, however, that there is a contradiction between those provisions. They are in fact compatible.

Article 4, section 4.1 provides as follows with respect to the CBA's jurisdiction:

> **4.1** This Agreement shall cover all INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL #370 work in the following counties East of the 120th Meridian: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Lincoln, Okanagan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman and Yakima in the State of Washington; and Benewah, Bonner, Boundary, Clearwater, Kootenai, Latah, Lewis, Nez Perce, Shoshone, and that part of Idaho County North of Parallel 46 in the State of Idaho.

The geographical "zones" that are set forth in "Addendum #1" and marked on the maps attached to "Addendum #1" merely add another level to Article 4.1. That additional level applies only to the reduced wage provision of the LOU, not to the remaining sections.

In other words, the overall region that the LOU covers remains at all times the nineteen counties in Washington and ten counties in Idaho that the CBA covers. The LOU's provisions governing "Shifts-Hours of Work-Overtime", "Reporting Pay-Minimum Pay" "Work Rule Change-Special Crew Manning Rules" and "Crushing" apply uniformly to all small works as defined in the LOU, wherever they may be located in the 29 counties. The geographical limitation to the areas within a 15-mile radius of certain cities (i.e. Ellensburg, Yakima, Wenatchee, Omak, Kennewick, Richland, Pasco, Lewiston, Walla Walla, Pullman, Moscow, Moses Lake and Spokane) *only* applies to the wage reduction provision.

It is somewhat unfortunate that Mark Poe did not raise his objection about honoring the "zones" and maps for determining wage rates under the small works LOU during the bargaining for the 2000-2003 CBA. If the evidence showed he had objected to the continued viability of the established past practice *before* the parties reached a final agreement on their current contract, this opinion would be very different. It is well established that, where an objection is raised to a *past practice* during bargaining for a successor agreement, the practice must be written into the contract thereafter in order to be continued. Where no objection is raised, however, all parties are held to a mutual understanding, or meeting of the minds, regarding the continued viability of the practice as an unwritten term of the contract.

Therefore, when Mark Poe announced on June 1, 2000, after the new CBA was signed, that he would henceforth decline to enforce the geographic "zones" because he could not find any express written reference to them anywhere in the CBA, he violated the parties' collective bargaining agreement. The "zones" had been preserved as an unwritten term of the contract and Poe, as well as all the other employers and the AGC remained bound to honor that

term until such time as they negotiate it out. The grievance is granted.

AWARD

For the reasons set forth in the preceding analysis and decision, the arbitrator has determined that the Employer, Poe Asphalt Paving, Inc., violated the parties' collective bargaining agreement. The grievance is granted. The union shall be made whole for all lost wages due to said Employer's failure to recognize the geographic limitations that the parties agreed to impose upon the implementation of the reduced wage provision for small works under their Small Works Letter of Understanding provision of their collective bargaining agreement.

Poe's violation was not in bad faith, however, but was based on an honest belief that the geographic limitations on payment of reduced wages were no longer in effect, after June 1, 2000. Therefore, the arbitrator declines to require penalty wages, as otherwise provided in Article 13.4.

The arbitrator hereby retains jurisdiction for sixty (60) days to assist the parties with implementation of this remedy.

The parties shall share equally in the arbitrator's fees and expenses.

Dated: _____

_____
SANDRA SMITH GANGLE, J.D.
Arbitrator